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## Drug War Madness: A Call for Consistency Amidst the Conflict

*Kasey C. Phillips\**

### INTRODUCTION

In recent weeks, months, and even years, the phrase “war on drugs” has typically been accompanied by the term “failure.” Walter Cronkite, former anchorman of the CBS evening news, noted that it is “plain for all to see: the war on drugs is a failure.”<sup>1</sup> Similarly, Joy Olson, executive director of the Washington Office on Latin America, a human rights organization promoting democracy, stated at a drug policy conference that she “think[s] U.S. drug policy has failed.”<sup>2</sup> Likewise, Terry Nelson, a member of Law Enforcement Against Prohibition, “considers the war on drugs to be the greatest public policy failure of all time.”<sup>3</sup> New York Times columnist Nicholas D. Kristof asserts that, forty years after President Nixon declared the war on drugs, “it now appears that drugs have won.”<sup>4</sup> Among the criticisms and complaints of United States drug policy are calls for reform by former international presidents,<sup>5</sup> nonprofit organizations,<sup>6</sup> judges,<sup>7</sup> politicians,<sup>8</sup> and scholars<sup>9</sup> alike.

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<sup>1</sup> Walter Cronkite, *Telling the Truth about the War on Drugs*, HUFFINGTON POST, Mar. 1, 2006, [http://www.huffingtonpost.com/walter-cronkite/telling-the-truth-about-t\\_b\\_16605.html](http://www.huffingtonpost.com/walter-cronkite/telling-the-truth-about-t_b_16605.html).

<sup>2</sup> Jesus Martinez, *The Failure of the War on Drugs*, BORDERZINE, Oct. 8, 2009, <http://borderzine.com/2009/10/the-failure-of-the-war-on-drugs/>.

<sup>3</sup> *Id.*

<sup>4</sup> Nicholas D. Kristof, *Drugs Won the War*, N.Y. TIMES, June 14, 2009, at 10, available at <http://www.nytimes.com/2009/06/14/opinion/14kristof.html>.

<sup>5</sup> *E.g.*, Tracy Wilkinson, *War on Drugs Called a Failure*, L.A. TIMES, Nov. 27, 2008, at A5, available at <http://articles.latimes.com/2008/nov/27/world/fg-mexdrugs27> (reporting that former Mexican president, Ernesto Zedillo, demanded “a major rethinking of U.S. [drug] policy”).

<sup>6</sup> *E.g.*, American Civil Liberties Union, <http://www.aclu.org/drug-law-reform> (calling for an “end [to] punitive drug policies”).

Part I of this Comment discusses and chronicles the history of drug use in the United States and responsive legislation at both the state and federal levels. Part II explains the transformation and development of drug policy throughout each presidential administration from President Nixon to President Obama. Part III acknowledges and analyzes the inconsistencies in drug policy among and within presidential administrations. Part IV discusses a few suggested methods in which to reform United States drug policy. Finally, Part V calls for consistency through the establishment of a Drug Policy Board that is entrusted with the responsibilities of researching, drafting, implementing, and enforcing drug policy.

### I. THE HISTORY OF DRUGS

Every action elicits a reaction, and drug use is no exception. Drug use is not a new concept, but rather an ancient one that keeps developing and recreating itself. In response to each new drug, or each new modification of an existing drug, comes legislation to regulate and/or prohibit use of that drug.

#### A. Early Drug Use

From opiates to cocaine and from marijuana to LSD,<sup>10</sup> the United States has had a constant love-hate relationship with drugs.

##### i. Opiates

Opiate<sup>11</sup> use can be traced back to ancient times. For centuries, opiates have been used both medicinally and recreationally.<sup>12</sup> In 3400 B.C., inhabitants of Mesopotamia

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<sup>7</sup> *E.g.*, Hon. Jim Gray, Judge, Orange County Superior Court, Address at the Chapman Law Review Annual Symposium (Jan. 29, 2010).

<sup>8</sup> *E.g.*, Asa Hutchinson, Former Congressman and Former Dir., U.S. Drug Enforcement Admin., Address at the Chapman Law Review Annual Symposium (Jan. 29, 2010).

<sup>9</sup> *E.g.*, Alex Kreit, Associate Professor of Law and Dir. of the Ctr. for Law and Social Justice, Thomas Jefferson School of Law, Address at the Chapman Law Review Annual Symposium (Jan. 29, 2010).

<sup>10</sup> "LSD" is the most well recognized name for lysergic acid diethylamide, which is often considered to be the most widely known and the most commonly used hallucinogen in the United States. Drug Abuse Help, Honest Drug Abuse Information: LSD Addiction, Abuse and Treatment, <http://www.drugabusehelp.com/drugs/lsd/> (last visited June 14, 2010).

<sup>11</sup> Opium is an addictive narcotic drug that is obtained from the seeds of an opium poppy. THE AMERICAN HERITAGE DICTIONARY 1233 (4th ed. 2000). Similarly, an opiate is a drug (such as morphine or heroin) containing or deriving from opium which tends to induce sleep and ease pain. *Id.*

<sup>12</sup> Evolution of Opiates in History, <http://www.opiates.com/opiates/opiate-history.html> (last visited June 14, 2010).

cultivated the first opium poppy and soon thereafter the opium trade flourished. Opium was traded throughout the Mediterranean, Europe, Persia, and India.<sup>13</sup>

In the early 1800s, European chemists separated morphine from opium to be used as a painkiller.<sup>14</sup> Morphine was considered a “wonder drug” because it virtually eliminated extreme pain and discomfort associated with injuries, surgeries, and other medical operations, and doctors used morphine to render patients completely numb and put them in a dream-like state.<sup>15</sup> Morphine made its debut in the United States in the 1850s and gained ever increasing popularity in the medical field because the benefits of using the drug were considered extraordinary.<sup>16</sup> Regrettably, the enormously addictive properties of morphine went unrecognized until after the Civil War.<sup>17</sup>

In 1895, Germany’s Bayer Company developed another opium derivative—heroin—by diluting morphine with acetyls, and it brought heroin to the commercial market three years later in 1898.<sup>18</sup> Early studies indicated that heroin was far more effective at treating respiratory illness than codeine, another opiate.<sup>19</sup> Understandably, just one year after Bayer brought heroin to the market it was being exported to twenty-three countries.<sup>20</sup>

## ii. Cocaine

The use of the coca plant dates back thousands of years.<sup>21</sup> South American Indians would honor the plant as a goddess.<sup>22</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> ELAINE CASEY, NATIONAL DRUG ABUSE CENTER FOR TRAINING AND DEVELOPMENT, HISTORY OF DRUG USE AND DRUG USERS IN THE UNITED STATES (1978), <http://www.druglibrary.org/schaffer/history/casey1.htm>.

<sup>15</sup> A German pharmacist, Dr. F. W. A. Sertürner named the drug morphine after the Greek god of dreams Morepheus, because of the extreme euphoric effects. History of Heroin, [http://www.friendsofnarconon.org/drug\\_education/index.php?option=content&task=view&id=28](http://www.friendsofnarconon.org/drug_education/index.php?option=content&task=view&id=28) (last visited June 14, 2010).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* See also CASEY, *supra* note 14 (stating that physicians believed that when injected intravenously, morphine was non-addictive and could cure addictions that were caused by processing opium through the stomach lining if ingested).

<sup>18</sup> Evolution of Opiates in History, <http://www.opiates.com/opiates/opiate-history.html> (last visited June 14, 2010). Heroin was advertised as being ten times more potent than morphine as a painkiller, and, because it was thought to be non-addictive, it was claimed that using heroin would cure opium and morphine addiction. CASEY, *supra* note 14.

<sup>19</sup> The Invention of Heroin, <http://www.michaelshouse.com/heroin-rehab/history-of-heroin-addiction.html> (last visited June 14, 2010).

<sup>20</sup> Heroin History, <http://www.heroin-addiction.info/history.htm> (last visited June 14, 2010).

<sup>21</sup> Dani Edmonson, *The History of Cocaine*, TRANSWORLDNEWS, Feb. 9, 2010, <http://www.transworldnews.com/NewsStory.aspx?id=180873&cat=15> (last visited June 14, 2010).

Indians would gnaw on the leaves of the plant with the belief that they were achieving spiritual protection and medical benefits, among other things.<sup>23</sup> Initially, upon arriving in South America, the Spanish rejected the coca plant; however, the Catholic Church began to cultivate the plant shortly thereafter and distributed it multiple times a day to laborers.<sup>24</sup> The Spanish returned to Europe with their new discovery, which shortly became known as “the elixir to life.”<sup>25</sup>

In 1860, chemist Albert Niemann finally isolated the active ingredient in the coca plant and named it cocaine.<sup>26</sup> Cocaine quickly became widespread because it could be included in cigarettes and alcohol when in powder form.<sup>27</sup> In the early 1900s, cocaine emerged on the global market and was embraced by the world.<sup>28</sup> Unfortunately, the negative effects of the drug quickly followed its widespread distribution.<sup>29</sup>

### iii. Marijuana

Like opiates and cocaine, marijuana has been used for centuries.<sup>30</sup> Marijuana spread from China to India and Africa before reaching Europe as early as A.D. 500.<sup>31</sup> The Spanish introduced marijuana to the western hemisphere in 1545, and by 1622, after the English brought it to Jamestown, it became a highly profitable crop.<sup>32</sup> Nonetheless, marijuana fell out of favor until its reemergence in the 1920s.<sup>33</sup> Some attribute marijuana’s rise in popularity to Prohibition.<sup>34</sup> Marijuana was particularly popular in the jazz community, and tea pads—marijuana clubs—

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Edmonson, *supra* note 21.

<sup>28</sup> *Id.* The Coca-Cola Company even incorporated cocaine into their early formulas. It was not until 1903 that Coca Cola actually removed cocaine from its formula. See In Search of the Big Bang: What is Crack Cocaine?, <http://www.cocaine.org/> (last visited June 15, 2010).

<sup>29</sup> Cocaine was socially linked to prostitutes, gamblers, and other societal outcasts. Edmonson, *supra* note 21.

<sup>30</sup> History of Marijuana, <http://www.narconon.org/drug-information/marijuana-history.html> (last visited June 15, 2010). Although a Chinese medical digest dated marijuana use, with intoxicating characteristics, back to 2737 B.C., the focus was its medicinal value. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> History of Marijuana, *supra* note 30 (explaining that in the South, cotton had replaced marijuana as the major cash crop by the late 1800s and marijuana was included in some medicines during this time, but only a tiny percentage compared to those medicines containing opium or cocaine).

<sup>34</sup> *Id.* See also CASEY, *supra* note 14 (listing a number of items that were the targets of the early twentieth century prohibitionists, including alcohol, tobacco, and marijuana).

appeared in all major cities throughout the United States.<sup>35</sup> The tea pads were tolerated by the police as marijuana was not illegal and tea pad clientele showed no signs of causing disturbances within the community.<sup>36</sup>

Until 1942, marijuana was included in the United States Pharmacopeia<sup>37</sup> as a medicine under the title “Extractum Cannabis.”<sup>38</sup> Marijuana was not only prescribed by physicians for labor pain, nausea, and rheumatism, among other ailments, but was also commonly used as an intoxicant until the 1930s.<sup>39</sup> It was then that the Federal Bureau of Narcotics started a campaign depicting marijuana as an addictive substance that could lead to addiction of other narcotics.<sup>40</sup> It claimed that marijuana was in fact a “gateway” drug.<sup>41</sup>

#### iv. Hallucinogens

The history of hallucinogens<sup>42</sup> is rooted in religious traditions that date back centuries.<sup>43</sup> One of the most common hallucinogens is lysergic acid diethylamide, more commonly known as LSD.<sup>44</sup> Two Swiss scientists, Dr. Albert Hofmann and W. A. Stoll of Sandoz Laboratories, discovered LSD in 1938.<sup>45</sup> Initial animal testing showed no extraordinary properties, resulting in the drug being shelved for the next five years. Then in 1943, Dr. Hofmann accidentally ingested the drug, thereby

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<sup>35</sup> History of Marijuana, *supra* note 33. See also CASEY, *supra* note 14.

<sup>36</sup> See History of Marijuana, *supra* note 30. So-called tea pads were accepted as much as speakeasies were accepted. The tea pads were in fact prevalent as there were allegedly 500 of them in New York City alone by the 1930s. CASEY, *supra* note 14.

<sup>37</sup> The United States Pharmacopeia “is a non-governmental, official public standards-setting authority for prescription and over-the-counter medicines and other healthcare products manufactured or sold in the United States.” The United States Pharmacopeia sets quality, purity, strength, and consistency standards for drugs as well as food ingredients and dietary supplements. The standards are utilized around the world in over one hundred thirty countries and have worked to ensure global public health for nearly two hundred years. See about USP, <http://www.usp.org/aboutUSP/> (last visited June 21, 2010).

<sup>38</sup> CASEY, *supra* note 14. The tea pads “resembled opium dens or speakeasies except that prices were very low; a man could get high for a quarter on marihuana smoked in the pad, or for even less if he bought the marihuana at the door and took it away to smoke.” *Id.*

<sup>39</sup> History of Marijuana, *supra* note 30.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Hallucinogens are drugs that cause hallucinations. They are partially composed of nitrogen and classified as alkaloids. See NIDA InfoFacts: Hallucinogens—LSD, Peyote, Psilocybin, and PCP, <http://www.drugabuse.gov/Infofacts/hallucinogens.html> (last visited June 21, 2010).

<sup>43</sup> *Id.*

<sup>44</sup> LSD has a variety of street names including “Acid, Cid, Trips, L, Doses, Vitamin L [and] Paper.” See *supra* note 10.

<sup>45</sup> CASEY, *supra* note 14.

unlocking the secret of its subsequent popularity.<sup>46</sup> After experiencing his first acid trip, Dr. Hofmann returned to the lab the following week and ingested another small amount in order to record the effects.<sup>47</sup> After his second acid trip, Dr. Hofmann sent the drug to the University of Lurich for W. A. Stoll to test.<sup>48</sup> Stoll found that the drug was non-toxic and non-addictive, but that an exceptionally small dose rendered intense results.<sup>49</sup> LSD supposedly first appeared in the United States in 1963, but the media did not acknowledge its widespread use until 1966.<sup>50</sup>

## B. Early Legislation

Not surprisingly, both State and Federal authorities reacted to the introduction of the various above-mentioned drugs. As the use of any particular drug became widespread, legislation quickly followed.

### i. State Legislation

In 1872, California led the way in opium prohibition by passing the first anti-opium law.<sup>51</sup> The law stated that “the administration of laudanum, an opium preparation, or any other narcotic to any person with the intent thereby to facilitate the commission of a felony” now amounted to a felony.<sup>52</sup> Unfortunately this law failed to control unlawful use of opium in the State.<sup>53</sup> In 1881, California tried again, enacting a law “making it a misdemeanor to maintain a place where opium was sold, given away, or smoked.”<sup>54</sup> However, the bill applied exclusively to commercial locations; smoking opium in a private residence was not covered, thus the practice continued.<sup>55</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> Dr. Hofmann recorded his experience, noting that he felt dizziness, was unable to focus, and could not control his laughter; the drug distorted his vision and his hearing and caused him to shout and babble intermittently. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> LSD is so potent it had to be measured in micrograms (millionths of a gram) as compared with other drugs that are measure in milligrams (thousandths of a gram); an amount the size of an aspirin tablet could generate effects in approximately three thousand people. *Id.*

<sup>50</sup> Drug Abuse Help: LSD, <http://www.drugabusehelp.com/drugs/lsd/> (last visited Mar. 13, 2010).

<sup>51</sup> CASEY, *supra* note 14.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> In 1881, California established a separate agency dedicated to narcotics enforcement; it was the first state to do so. California was also among the first states that provided treatment for addicts. CASEY, *supra* note 14.

Following California's lead, more western states began to pass legislation restricting the use of opium.<sup>56</sup>

Early laws tended to limit or ban possession of opium derivatives without consideration as to whether the substances had any medicinal value. Laws focused on the manner in which drugs changed hands, rather than determining what qualified as legitimate medicinal use. With their limited knowledge, doctors continued to recommend opium derivatives to cure an assortment of ailments despite the obvious problems with addiction.<sup>57</sup>

In the 1920s, states also started passing laws in an attempt to temper marijuana use. Louisiana lead the charge, passing a law in 1927 that required a \$500 fine or six months in prison for the sale or possession of marijuana.<sup>58</sup> Despite frequent arrests and a decline in imports, marijuana use continued.<sup>59</sup> Two years later, Colorado passed legislation also targeted at prohibiting marijuana.<sup>60</sup> By 1937, forty-six states and the District of Columbia had enacted laws against marijuana use.<sup>61</sup>

Hallucinogens, including LSD, were also the subject of prohibitive legislation. In 1965, the state of New York enacted legislation that prohibited "possessing, selling, giving away, or

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<sup>56</sup> In 1877, Nevada became the first state to actually prohibit opium smoking; the law stated that it was illegal to sell opium without a prescription and it forbade the continuation of any place used for smoking opium. Also in 1887, the Territory of Oregon passed the first comprehensive anti-substance law, requiring physicians and pharmacists to have licenses and prohibiting the sale, gift, or possession of "opium, 'smoking opium,' morphine, cocaine, or chloral hydrate, except by prescription of a licensed physician." Other states enacted similar legislation, but uniformity was lacking and the legislative schemes did not agree on which drugs to control, which controls to enforce, and what type of penalties to impose upon violators. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> CASEY, *supra* note 14.

<sup>59</sup> *Id.*

<sup>60</sup> Colorado's 1929 anti-marijuana laws were probably passed to curb the habits of Mexican laborers who brought marijuana with them when they journeyed to Colorado to work in the sugar beet fields. *Id.*

<sup>61</sup> State legislation against marijuana only increased after the federal government passed the Marijuana Tax Act of 1937. EDWARD M. BRECHER, ET AL., *LICIT AND ILLICIT DRUGS* 413, 419-20 (Little, Brown & Co. 1972). Most states thought that marijuana penalties should mirror heroin penalties; because of this, marijuana penalties increased overnight in comparison to the heroin penalties that had taken decades to intensify. *Id.* State penalties were severe and, as recently as 1970, the following laws were enforced. In Georgia, the first-time sale of marijuana to a minor sent the seller to prison for life; a second offense gave him the death penalty. *Id.* In Illinois, a first time offense of selling marijuana was punishable by ten years to life in prison; a second offense required a life sentence. *Id.* In Louisiana, possession of marijuana called for five years of hard labor; selling marijuana to an adult was a minimum of ten years hard labor, while selling it to someone under twenty-one could result in a maximum penalty of death, even with just the first offense. *Id.* In Massachusetts, a person was sentenced to up to five years in prison for being in a place where marijuana was stored or for accompanying anyone known to possess marijuana. *Id.* In Missouri, a first-sale offense could result in a life sentence; if the sale was to a minor, the sentence was death. *Id.*



otherwise distributing LSD,” and imposed a maximum two year prison sentence for those convicted.<sup>62</sup> California followed New York’s lead when it passed the Grunsky bill in 1966, which forbade the “possession, sale, manufacture, or importation” of LSD.<sup>63</sup>

## ii. Federal Legislation

State legislatures were not the only ones to get involved in the prohibition of drugs; the federal government enacted its fair share of drug related legislation aimed at prohibition.

The U.S. Congress banned opium in 1905.<sup>64</sup> Then, in 1906, Congress enacted the first Pure Food and Drug Act, which required that medicines containing opiates have a label indicating opium contents.<sup>65</sup> The Pure Food and Drug Act, the efforts leading up to it, and the later amendments to the Act helped to temper an increase in new addicts; there was even a slight decrease in opiate addition from the end of the nineteenth century until 1914.<sup>66</sup> However, this was not enough.

In 1914, the U.S. government passed the Harrison Narcotic Act with the ultimate purpose of eliminating the illegal supply of opiates.<sup>67</sup> The Act required manufacturers, importers, pharmacists, and physicians prescribing narcotics to become licensed to do so and implemented a small tax.<sup>68</sup> At first glance, the Harrison Narcotic Act did not appear to be a prohibition law; it just seemed to be a regulation to ensure a systematic marketing of opiates—in tiny amounts over-the-counter and in larger amounts by prescription. In fact, physicians had an express right to prescribe opiate medications: “Nothing contained in this section shall apply . . . [t]o the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or

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<sup>62</sup> In 1966, New York increased the maximum term of imprisonment to twenty years in response to the panic felt by its citizens. CASEY, *supra* note 14.

<sup>63</sup> The new legislation and its publicity resulted in increased popularity and increased prices for LSD. *Id.*

<sup>64</sup> Opium Throughout History, <http://www.pbs.org/wgbh/pages/frontline/shows/heroin/etc/history.html> (last visited June 20, 2010).

<sup>65</sup> Congress later amended the Act, requiring that the quantity of the opiate content be designated on the label and that the drug meet national identity and purity regulations. BRECHER, *supra* note 61, at 47.

<sup>66</sup> *Id.*

<sup>67</sup> Harrison Narcotics Tax Act of 1914, Pub. L. No. 223, § 2, 38 Stat. 785, 786–87 (1915) (purporting to prohibit “any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order . . . on a form to be issued . . . by the Commissioner of Internal Revenue”).

<sup>68</sup> The act exempted patient-medicine manufacturers only if they limited themselves to “preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin . . . in one avoirdupois ounce.” *Id.*

veterinary surgeon registered under this Act in the course of his professional practice only . . . .”<sup>69</sup> Thus, it is likely that no legislator in 1914 recognized that the Act would be considered prohibition legislation in the future.

It was the last phrase in the Act that became controversial. Authorities interpreted the phrase “in the course of his professional practice only” to mean that opiates could not be prescribed for addicts to feed their addiction because addiction is not a disease and thus, an addict is not a patient for which physicians could prescribe medicine “in the course of [their] professional practice . . . .”<sup>70</sup> With this interpretation, a law once designed to ensure orderly marketing of opiates was transformed into legislation prohibiting the furnishing of opiates to addicts, even by prescription.<sup>71</sup>

The Harrison Act had other unforeseen consequences—namely, the development of a raging black market. Just six months after the passage of the Harrison Act, an editorial in *American Medicine* acknowledged the gravity of drug addiction.<sup>72</sup> The article accused the Harrison Act of failing to do what it was designed to do—in fact, it made things worse, not better.<sup>73</sup> Doctors were unable to provide medical attention to those who needed it most, addicts. Open and legitimate means of obtaining drugs were eliminated and addicts were “driven to the underworld” where they were forced to obtain drugs through illegal channels.<sup>74</sup> The article went on to describe the black market that was exacerbated by the Harrison Act, portraying people who were under the influence as the “worst elements of society.”<sup>75</sup>

Just three years after Congress passed the Harrison Act, the Secretary of the Treasury created a committee<sup>76</sup> to review the problems created by the act.<sup>77</sup> The committee eventually called for stricter law enforcement and more state laws designed after

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<sup>69</sup> *Id.*

<sup>70</sup> BRECHER, *supra* note 61.

<sup>71</sup> Numerous physicians fell prey to this interpretation; they were arrested, convicted, and imprisoned. Those who were not imprisoned still faced ruinous publicity that virtually decimated their careers. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> BRECHER, *supra* note 61.

<sup>76</sup> Committee members included: Congressman Homer T. Rainey (Chairman), a professor of pharmacology at Harvard, a former deputy commissioner of internal revenue responsible for law enforcement, and Dr. A. G. Du Mez, Secretary of the United States Public Health Service. *Id.*

<sup>77</sup> *Id.*

the Harrison Act, and Congress responded.<sup>78</sup> However, despite Congress' attempts to rectify the problems, the Harrison Act faced continual and constant criticism.<sup>79</sup>

In 1930, the Federal Bureau of Narcotics (FBN) was established<sup>80</sup> and assumed control over the enforcement of federal anti-opiate and anti-cocaine laws.<sup>81</sup> FBN Commissioner Harry J. Anslinger lobbied to have marijuana included in future federal laws.<sup>82</sup> After much urging, Congress finally enacted the Marihuana Tax Act of 1937.<sup>83</sup> While the Marihuana Tax Act did not actually prohibit marijuana, it imposed a tax on distributors.<sup>84</sup> However, the Act also recognized the medical significance of marijuana.<sup>85</sup> During that same time period, Congress passed a program imposing higher penalties for subsequent violations of drug laws.<sup>86</sup>

Over the course of the next few decades, Congress continued to pass drug laws. In 1939, the federal government enacted a law allowing authorities to impound any vehicle used to

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<sup>78</sup> Congress tightened the Harrison Act by, among other things, completely prohibiting heroin imports. The prohibition derived from the growing societal belief that heroin was significantly more harmful than morphine or opium. In 1925, Dr. Lawrence Kolb stated that any difference between the effects of morphine and heroin would be too miniscule to verify. Similarly, in 1967, President Johnson's Committee on Law Enforcement and Administration of Justice concluded that heroin and morphine did not differ in effect, although heroin was faster-acting. *Id.*

<sup>79</sup> In 1936, Berkley, California's former chief of police, August Vollmer, asserted that strict laws were not only "useless and enormously expensive," but were also "unjustifiably and unbelievably cruel in their application . . . ." Vollmer argued that drug addiction was not a police problem, but rather a medical one. AUGUST VOLLMER, *THE POLICE AND MODERN SOCIETY* 117-18 (McGrath Publishing Co. 1969). Then, in 1940, recognized critic of drug laws Professor Alfred Lindesmith compared imprisoning an addict to imprisoning a patient for contracting a disease; he stated that both would be cruel and unusual punishment. A. R. Lindesmith, "Dope Fiend" *Mythology*, 31 J. AM. INST. OF CRIM. L. & CRIMINOLOGY 199, 207-208 (July-Aug. 1940). In 1953, the chairman of the American Bar Association, Rufus King, Esq., wrote that an addict was a slave to his habit and would commit crimes to feed his addictions; King went on to state that the billions of dollars spent on enforcement had done nothing but increase profits in the black market. Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L. J. 736, 749 (1953).

<sup>80</sup> Marijuana Timeline—Important Dates in History of Marijuana, <http://marijuanatoday.com/timeline.php> (last visited June 23, 2010).

<sup>81</sup> CASEY, *supra* note 14.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> People in the medical field paid an annual licensing fee of one dollar, enabling them to prescribe marijuana to patients. Pharmacists had to pay a fifteen dollar licensing fee to dispense marijuana. Growers had to pay an annual tax of twenty-five dollars to continue cultivating the drug. Importers and manufacturers paid fifty dollars a year to continue their businesses. All other untaxed sale or possession of marijuana was made illegal. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

transport illegal drugs.<sup>87</sup> In 1942, opium growers were forced to obtain a license under a federal opium poppy control act.<sup>88</sup> In 1946, Congress passed legislation controlling synthetic drugs.<sup>89</sup> In 1951, the Boggs Act set forth mandatory minimum prison sentences of two to five years for first time drug offenders.<sup>90</sup>

In 1956, President Eisenhower signed the Narcotic Control Act, which increased penalties for drug law violations originally set forth by the Boggs Act.<sup>91</sup> It extinguished virtually all discretion to suspend or reduce the sentences of anyone convicted of violating any other federal criminal law.<sup>92</sup> The Act authorized narcotics agents and customs officers to carry guns, serve warrants, and arrest violators without a warrant.<sup>93</sup> All convicted drug offenders, addicts, and users were required to register for and acquire a special certificate to leave the United States. They were required to return the certificate upon re-entering the United States.<sup>94</sup> Failure to comply with this requirement resulted in imprisonment ranging from one to three years and a fine.<sup>95</sup> In addition, the Act impacted immigration laws. Narcotic offenses were now grounds for exclusion or deportation, and courts were prohibited from discouraging deportation in proceedings involving convicted drug offenders.<sup>96</sup>

Despite, or perhaps because of, the stringent laws in place prohibiting opiates, marijuana, and synthetic drugs, Americans began to adopt new substances to take the place of those that had become illegal. This immediately caused Congress to react by passing the Drug Abuse Control Amendments of 1965.<sup>97</sup> Unlike the Harrison Act, which relied on the taxing power, the Drug Abuse Control Amendments relied on Congress' interstate commerce power.<sup>98</sup> The legislation covered all known

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<sup>87</sup> *Id.* at 17.

<sup>88</sup> CASEY, *supra* note 14.

<sup>89</sup> *Id.* at 18.

<sup>90</sup> Jordan Smith, *Reefer Madness: Drug Laws Are So Fifties*, AUSTIN CHRON., Oct. 17, 2008, at 30, available at <http://www.austinchronicle.com/download/2008-10-17/chronicle.pdf>.

<sup>91</sup> The Act required a sentence of five to twenty years for first time convictions of drug smuggling or selling, and a sentence of ten to forty years for subsequent violations; there was a required sentence of ten to forty years for sale by an adult to a minor, and a sentence of ten years to life, or even death, if the adult sold heroin to the minor. RUFUS KING, *THE DRUG HANG UP, AMERICA'S FIFTY-YEAR FOLLY* 147 (Charles C. Thomas 1974) (1972). See also Smith, *supra* note 90.

<sup>92</sup> KING, *supra* note 91.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 147–48.

<sup>96</sup> *Id.*

<sup>97</sup> KING, *supra* note 91, at 279.

<sup>98</sup> *Id.*

depressants and stimulants, and all other substances that could potentially be abused because of their depressant, stimulant, or hallucinogenic effects.<sup>99</sup> The registration, inspection, and record-keeping requirements of the Amendments practically mirrored those of the Harrison Act.<sup>100</sup> While lighter punishments for opiate, cocaine, and marijuana offenses were imposed with no mandatory minimum penalties, mere possession without proper compliance was a federal crime.<sup>101</sup> However, what made the Drug Abuse Control Amendments of 1965 different from past legislation was the inclusion of a “counterfeit drugs provision.”<sup>102</sup>

In 1966, Congress passed the Narcotic Addict Rehabilitation Act, which, rather than focusing on enforcement of drug laws, centered on treatment.<sup>103</sup> The Act consisted of four main sections: Section One enabled addict offenders to choose treatment over prosecution; Section Two allowed for treatment following conviction; Section Three provided that in the absence of a federal crime an addict could petition the United States Attorney in his or her district for treatment; and Section Four granted state funding for treating drug addiction.<sup>104</sup> In 1968, President Johnson created the Bureau of Narcotics and Dangerous Drugs (BNDD) under the Department of Justice by combining the Federal Bureau of Narcotics with the Bureau of Drug Abuse Control.<sup>105</sup> This new bureau enforced federal laws relating to the suppression of illegal drugs.<sup>106</sup>

Despite the aggressive legislation enacted by Congress, America’s love affair with drugs continued and progressed into “a serious national threat.”<sup>107</sup>

### C. Declaration of the “War On Drugs”

On July 14, 1969, President Richard Nixon drafted a special message to Congress to address America’s drug problem.<sup>108</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 279–80.

<sup>101</sup> *Id.* at 280.

<sup>102</sup> KING, *supra* note 91, at 280.

<sup>103</sup> Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438 (1967).

<sup>104</sup> Narcotic Addict Rehabilitation Act of 1966, *supra* note 103.

<sup>105</sup> Dep’t of Justice, Supplemental Financial and Management Information: DEA History, <http://www.justice.gov/oig/reports/DEA/a9731a/a9731ap5.htm> (last visited June 20, 2010).

<sup>106</sup> *Id.*

<sup>107</sup> Richard Nixon Foundation, Special Message to Congress on Control of Narcotics and Dangerous Drugs, July 14, 1969, [http://www.nixonlibraryfoundation.org/clientuploads/directory/archive/1969\\_pdf\\_files/1969\\_0266.pdf](http://www.nixonlibraryfoundation.org/clientuploads/directory/archive/1969_pdf_files/1969_0266.pdf) [hereinafter Richard Nixon Foundation, Special Message]

<sup>108</sup> *Id.*

President Nixon urged that a national drug policy was necessary and asserted that it needed to start at the federal level.<sup>109</sup> The message stated that Congress would receive a “comprehensive legislative proposal to control . . . drugs,” and encouraged Congress to “take favorable action.”<sup>110</sup> President Nixon also addressed state involvement in drug control; states were to be provided with a model law designed to improve their drug laws and “complement the comprehensive drug legislation being proposed to Congress at the national level.”<sup>111</sup> President Nixon hoped that “[t]ogether these proposals [would] provide an interlocking trellis of laws which [would] enable government at all levels to more effectively control the [drug] problem.”<sup>112</sup> Furthermore, the letter called for international cooperation, suppression of illegal importation, suppression of national trafficking, education, research, rehabilitation for addicts and convicts, training programs for law enforcement officers, and local law enforcement conferences.<sup>113</sup>

In 1970, in response to President Nixon’s message, Congress replaced over fifty pieces of drug legislation with the Drug Abuse Prevention and Control Act; Title II of which is widely known as the Controlled Substances Act (CSA).<sup>114</sup> The CSA created five schedules which categorized controlled substances and provided various penalties for violations; drugs were classified according to dangerousness, potential for abuse, and medicinal value.<sup>115</sup> Schedule I drugs included heroin, marijuana, LSD, THC, and general hallucinogens.<sup>116</sup> Schedule II drugs consisted of opium, morphine Dilaudide, Demerol, Methadone, cocaine, and liquid amphetamine.<sup>117</sup> Amphetamines, short-acting barbiturates, DoridenR, Noludalo, and RitalenP were listed as Schedule III drugs, while mild tranquilizers and long-acting barbiturates filled Schedule IV.<sup>118</sup> The final category, Schedule V, contained mostly over-the-counter substances.<sup>119</sup> To supplement the Drug Abuse Prevention and Control Act, the National Conference of Commissioners approved the Uniform Controlled Substances Act,

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Richard Nixon Foundation, Special Message, *supra* note 107.

<sup>114</sup> Supplemental Financial and Management Information: DEA History, <http://www.justice.gov/oig/reports/DEA/a9731a/a9731ap5.htm> (last visited May 13, 2010).

<sup>115</sup> *Id.*

<sup>116</sup> CASEY, *supra* note 14.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

which called for state scheduling of federally controlled drugs but left it up to each state to prescribe their own penalties.<sup>120</sup>

At a press conference in June 1971, President Nixon stated that “America’s Public Enemy No. 1 is drug abuse,” and he officially heralded the beginning of the War on Drugs.<sup>121</sup> The President called for the establishment of a Special Action Office of Drug Abuse Prevention that would be charged with coordinating the activities of the nine federal organizations already engaged in drug control efforts.<sup>122</sup> This new office would construct and launch a federal strategy for drug programs, and the office would be responsible for “federal drug-abuse prevention, education, treatment, rehabilitation, training, and research programs.”<sup>123</sup> President Nixon also executed an Executive Order temporarily establishing the office and named Dr. Jerome H. Jaffe as Director.<sup>124</sup>

The newly announced drug program was slated to cost \$371 million.<sup>125</sup> The largest portion of the budget was designated for the treatment and rehabilitation of drug-addicted Vietnam veterans.<sup>126</sup> The program also called for \$2 million to be devoted to research and development in detecting illegal drug traffic, \$2 million for research and development of herbicides which would be used to destroy narcotics-producing plants and \$26.6 million to intensify customs regulations.<sup>127</sup> President Nixon requested that \$10 million be allocated to drug education and training.<sup>128</sup> President Nixon, the drafters of the drug program, and drug prohibitionists were hopeful that the new policies would defeat the new Public Enemy No. 1.

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<sup>120</sup> *Id.*

<sup>121</sup> *The Nation: The New Public Enemy No. 1*, TIME, June 28, 1971, at 20, available at <http://www.time.com/time/magazine/article/0,9171,905238-1,00.html>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* Jaffe was the Director of the Drug Abuse Program for the Illinois Department of Mental Health as well as a “leading expert on methadone therapy for heroin addicts and a major figure in research on drug abuse.” *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* President Nixon suggested and implemented a program requiring all soldiers to submit to urine tests to determine if they had drugs in their system. Those determined to be using drugs would be subjected to a week of detoxification before returning to the United States, and a possible three weeks of additional therapy at Veterans Administration (VA) facilities upon their return. The program was intended to provide treatment and rehabilitation at VA facilities to all former servicemen, including those who had been dishonorably discharged and were not previously eligible for VA services. *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> President Nixon stated “[i]t is essential that the American people are alerted to this danger, to recognize that it is not a danger that will pass with the end of the war in Viet Nam, because the problem existed before we were in Viet Nam.” *Id.*

## II. PRESIDENTIAL ADMINISTRATIONS AND THEIR DRUG POLICIES

Every Presidential Administration sets new drug policies, appoints new officials in drug-related agencies, and creates new drug control budgets. Some administrations elect to build upon their predecessors, while others choose to start new programs.

### A. Nixon Navigated the War on Drugs

Throughout his administration, President Nixon stayed true to his anti-drug policies. In 1972, the National Commission on Marijuana and Drug Abuse, the American Medical Association, and the National Institute of Mental Health concluded and advised that possession and distribution of marijuana should be decriminalized because “experimental or intermittent use of this drug carries minimal risk to the public health, and should not be given overzealous attention in terms of a public health response.”<sup>129</sup> The American Bar Association suggested decreased penalties for marijuana possession.<sup>130</sup> President Nixon rejected these reports and declared an “all-out global war on the drug menace.”<sup>131</sup>

President Nixon and Congress agreed to consolidate all federal drug control agencies under the command of the Department of Justice, and thus formed the Drug Enforcement Agency (DEA) on July 1, 1973.<sup>132</sup> On October 4, 1973, John R. Bartels, Jr. was confirmed as the DEA’s first administrator; his goals were “(1) to integrate narcotics agents and U.S. Customs agents into one effective force; and (2) to restore public confidence in narcotics law enforcement.”<sup>133</sup> Within the same year, Dr. Jaffe, head of the Special Action Office of Drug Abuse Prevention, was succeeded by Dr. Robert DuPont.

President Nixon was steadfast in his beliefs about marijuana and once told Dr. DuPont “[y]ou’re the drug expert, not me, on every issue but one, and that’s decriminalization of marijuana. If

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<sup>129</sup> Ricardo Cortes, *Sketches of the Drug Czars*, VANITY FAIR, July 29, 2009, <http://www.vanityfair.com/politics/features/2009/07/drug-czars-slideshow200907?printable=true&slide=6>.

<sup>130</sup> *Id.*

<sup>131</sup> Message to the Congress Transmitting Reorganization Plan 2 of 1973: Establishing the Drug Enforcement Administration, 1 PUB. PAPERS 228 (Mar. 28, 1973), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=4159>.

<sup>132</sup> President Nixon abolished the Bureau of Narcotics and Dangerous Drugs, the Office of Drug Abuse Law Enforcement, and the Office of National Narcotics Intelligence by executive order, thereby placing their combined responsibilities in the newly-formed DEA. DEA: A TRADITION OF EXCELLENCE, 1973–2003 13, <http://www.justice.gov/dea/pubs/history/1970-1975.pdf>.

<sup>133</sup> *Id.* at 14.



you make any hint of supporting [it], you are history.”<sup>134</sup> However, President Nixon’s presidential term did not last much past the appointment of Dr. Dupont. On August 10, 1974, President Nixon formally resigned from the office of President, thus ushering in President Gerald Ford and the first of a long line of drug policy contradictions.

#### B. Ford Frustrated the Crusade Against Drugs

In 1974, Gerald Ford became the first Vice President to rise to the Presidency by virtue of the current President resigning from office. Robert DuPont stayed on as head of the Special Action Office of Drug Abuse Prevention but revealed his support for decriminalizing marijuana.<sup>135</sup> President Ford largely backed away from Former President Nixon’s drug policy and essentially dissolved DuPont’s office.<sup>136</sup> President Ford ordered the White House Domestic Council to “undertake a comprehensive review and assessment of the overall Federal drug abuse prevention, treatment and enforcement effort to ensure that [drug] programs, policies and laws are appropriate and effective.”<sup>137</sup> In March of 1976, Congress amended the Drug Abuse Office and Treatment Act of 1972 to establish the Office of Drug Abuse Policy (ODAP) in an attempt to vest the responsibility for the federal drug program as a whole in a single person within the Executive Office of the President.<sup>138</sup>

In May 1976, President Ford announced two new cabinet committees devoted to the drug program: the Cabinet Committee on Drug Law Enforcement<sup>139</sup> and the Cabinet Committee on Drug Abuse Prevention, Treatment and Rehabilitation.<sup>140</sup> On July 1, 1976, President Ford presented a special message to Congress requesting that they rescind funding for the Office of Drug Abuse Policy because the office “adds to the bureaucracy a redundant layer that will have no direct management responsibilities,” and because “[t]he drug abuse area . . . already has the necessary coordinating mechanisms and resources to

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<sup>134</sup> Cortes, *supra* note 130.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Special Message to the Congress on Crime, 1 PUB. PAPERS 850 (June 19, 1975), available at <http://www.presidency.ucsb.edu/ws/?pid=5007>.

<sup>138</sup> CONGRESSIONAL RESEARCH SERVICE, EXEC. OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW 14 (2008), available at <http://www.fas.org/sgp/crs/misc/98-606.pdf>.

<sup>139</sup> Memorandum on the Cabinet Committee for Drug Law Enforcement, 2 PUB. PAPERS 1549 (May 13, 1976), available at <http://www.presidency.ucsb.edu/ws/?pid=5982>.

<sup>140</sup> Memorandum on the Cabinet Committee on Drug Abuse Prevention, Treatment, and Rehabilitation, 2 PUB. PAPERS 465 (May 13, 1976), available at <http://www.presidency.ucsb.edu/ws/?pid=5983>.

accomplish its objectives.”<sup>141</sup> Overall, President Ford’s administration presented a milder tone to drug policy reform.

### C. Carter Clamored for Drug Policy Reform

In 1977, Jimmy Carter assumed office as President, and drug policy took a major turn.<sup>142</sup> President Carter’s drug platform was one of decriminalization.<sup>143</sup> In a message to Congress, President Carter made amendments to the Reorganization Plan No. 1 of 1977 by transferring the “functions of the Office of Drug Abuse Policy and its Director . . . to the President, who may delegate such functions within the Executive Office of the President as the President may from time to time deem desirable.”<sup>144</sup> President Carter appointed Dr. Peter Bourne to assume these functions.<sup>145</sup> Dr. Bourne asserted that marijuana was not a health issue and the White House encouraged the National Cancer Institute to increase the availability of marijuana.<sup>146</sup> In October 1977, “the Senate Judiciary Committee voted to decriminalize possession of up to an ounce of marijuana for personal use.”<sup>147</sup>

However, in July 1978, the Carter administration’s drug policy reform came to a screeching halt after a scandal arose from a party that had been hosted by the National Organization for the Reform of Marijuana Laws (NORML) in December of the previous year.<sup>148</sup> *The Washington Post* reported that Dr. Bourne had used cocaine and marijuana at that party.<sup>149</sup> Bourne immediately resigned his position and was replaced by Lee Dogoloff, who wanted absolutely nothing to do with NORML, and instead was more responsive to Families in Action, an anti-marijuana organization primarily made up of concerned parents.<sup>150</sup> Dogoloff insisted that all drugs were bad and that penalties for so-called “soft” drugs, like marijuana, should be the same as for “hard” drugs like cocaine and heroin, because there

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<sup>141</sup> Special Message to the Congress on a Proposed Appropriations Rescission for the Office of Drug Abuse Policy, 2 PUB. PAPERS 633 (July 1, 1976), *available at* <http://www.presidency.ucsb.edu/ws/?pid=6170>.

<sup>142</sup> Cortes, *supra* note 130.

<sup>143</sup> *Id.*

<sup>144</sup> Executive Office of the President Message to the Congress Transmitting Amendments to Reorganization Plan No. I of 1977, 2 PUB. PAPERS 1592 (Sept. 15, 1977), *available at* <http://www.presidency.ucsb.edu/ws/?pid=6634>.

<sup>145</sup> Cortes, *supra* note 130.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> PATRICK ANDERSON, *HIGH IN AMERICA: THE TRUE STORY BEHIND NORML AND THE POLITICS OF MARIJUANA* 304 (1981), *available at* <http://www.druglibrary.org/special/anderson/highinamerica19.htm>.

was essentially no difference.<sup>151</sup> In 1979, in a complete change of direction from President Carter's campaign and original drug policy actions, the DEA created a model anti-paraphernalia law for state legislatures.<sup>152</sup> What started out as a dynamic shift in drug policy eventually dissipated, and soon all remnants of decriminalization were completely stamped out by a new presidential administration.

#### D. Reagan Revitalized the War on Drugs and "Just Said No"<sup>153</sup>

Ronald Reagan was elected President in 1980, and when he assumed office in January 1981, he ushered in the era of "zero tolerance."<sup>154</sup> In 1982, President Reagan criticized the drug policy of former President Carter by stating that he was "taking down the surrender flag . . . [and] running up the battle flag."<sup>155</sup> President Reagan shifted the focus of drug policy away from treatment and toward enforcement. He believed that the government had no place in interfering with the lives of addicts, and thus treatment centers were shutdown.<sup>156</sup> Money was diverted from treatment to attacking the drug problem at its source through the prohibition of drug cultivation, smuggling, and trafficking.<sup>157</sup> U.S. District Attorneys were ordered to "abandon their long-established emphasis on white-collar crime and focus instead primarily on drug violations."<sup>158</sup> In President Reagan's drug policy, numbers were the key to showing the American public that the Reagan Administration was active in the war on drugs.<sup>159</sup> Associate Attorney General Rudy Giuliani commented that Reagan's efforts were the "most intense federal effort ever against drugs."<sup>160</sup>

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<sup>151</sup> Walter Wink, *Drug Policy: The Fix We're In*, CHRISTIAN CENTURY, Feb. 24, 1999, at 214, available at [http://findarticles.com/p/articles/mi\\_m1058/is\\_6\\_116/ai\\_54062897/?tag=content;coll](http://findarticles.com/p/articles/mi_m1058/is_6_116/ai_54062897/?tag=content;coll).

<sup>152</sup> The constitutionality of the model law was questionable, but its impact was clear—the anti-marijuana proponents had the go-ahead from the Carter administration. ANDERSON, *supra* note 150. See also *Law: Potshots at "Head Shops"*, TIME, Apr. 21, 1980, at 78, available at <http://www.time.com/time/magazine/article/0,9171,924029,00.html>.

<sup>153</sup> On July 4, 1984, at an elementary school in California, a student asked the First Lady what he should do if he was offered drugs; the First Lady simply responded "just say no." RONALD REAGAN AND THE 1980S: PERCEPTIONS, POLICIES, LEGACIES 49 (Cheryl Hudson & Gareth Davies eds., Palgrave MacMillan 2008) [hereinafter RONALD REAGAN AND THE 1980S].

<sup>154</sup> Cortes, *supra* note 130.

<sup>155</sup> RONALD REAGAN AND THE 1980S, *supra* note 153.

<sup>156</sup> Wink, *supra* note 151.

<sup>157</sup> *Id.*

<sup>158</sup> RONALD REAGAN AND THE 1980S, *supra* note 155, at 48.

<sup>159</sup> *Id.*

<sup>160</sup> Cortes, *supra* note 130.

President Reagan put Carlton Turner in charge of drug policy and encouraged every Cabinet member to establish a drug program within his or her department.<sup>161</sup> Even First Lady Nancy Reagan invested herself in tackling drug problems. Nancy Reagan coined what became the motto for anti-drug activists—"Just Say No."<sup>162</sup> Also during this time, Senator Joe Biden (now Vice President Biden) advocated for a "drug czar"—a Cabinet-level position to coordinate federal drug agencies.<sup>163</sup>

While President Reagan was strict and steadfast in his anti-drug policy, the situation did not appear to be improving. The National Institute on Drug Abuse compiled monthly figures on drug-related deaths.<sup>164</sup> Under former President Carter, the number of deaths steadily declined, but within just months of President Reagan taking office, drug-related deaths were on the rise.<sup>165</sup> Eventually, the Reagan administration ordered the National Institute on Drug Abuse to stop releasing their findings, claiming they were "no longer relevant to the War on Drugs."<sup>166</sup>

Additionally, while the Reagan administration primarily focused on marijuana use, it was forced to confront cocaine head on—a situation that Carlton Turner, as a non-physician, was unable to handle.<sup>167</sup> Turner resigned his position after isolating himself by refusing to speak with any treatment professionals regarding the quickly developing crack cocaine problem.<sup>168</sup> Dr. Ian MacDonald replaced Turner, but was also not equipped to deal with America's drug problems.<sup>169</sup> Instead, it was Attorney General Ed Meese who continued to lead the charge, remaining focused on military and law enforcement approaches and refusing to even entertain treatment ideas raised by Dr. MacDonald.<sup>170</sup> Democratic Speaker of the House Tip O'Neill threw his hat into the drug policy ring, urging Democrats to be as tough on drugs as their Republican counterparts.<sup>171</sup> From June 1986 until October of that same year, twenty-six new mandatory minimum sentences for drug crimes were passed.<sup>172</sup> By the end

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<sup>161</sup> RONALD REAGAN AND THE 1980S, *supra* note 155, at 50–51.

<sup>162</sup> See RONALD REAGAN AND THE 1980S, *supra* note 155 and accompanying text.

<sup>163</sup> Cortes, *supra* note 130.

<sup>164</sup> RONALD REAGAN AND THE 1980S, *supra* note 155, at 51.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 52.

<sup>168</sup> *Id.*

<sup>169</sup> RONALD REAGAN AND THE 1980S, *supra* note 155, at 52.

<sup>170</sup> *Id.* at 53.

<sup>171</sup> *Id.* at 54.

<sup>172</sup> *Id.*

of the Reagan administration, America was practically in a state of hysteria over the progressing drug problem.<sup>173</sup>

#### E. Bush Believed Enforcement Was Key

After George H. W. Bush took presidential office, he signed into law the Anti-Drug Abuse Act of 1988.<sup>174</sup> The Act set out to fight illegal drug use primarily through the creation of the Office of National Drug Control Policy (ONDCP).<sup>175</sup> President Bush appointed William Bennett to lead the ONDCP, in a position more commonly known as “drug czar.”<sup>176</sup> Bennett took an extreme stance on drug use, claiming that addicts were not sick, but rather that they were immoral.<sup>177</sup> Bennett believed that offenders were responsible for themselves and that if they were not going to stop using drugs and harming society, then they did not deserve treatment.<sup>178</sup> His message was clear: being bad resulted in the fullest penalties of the law, not help in the form of treatment or rehabilitation.<sup>179</sup>

In September of 1989, President George H. W. Bush presented the federal government’s plan for eliminating drug use.<sup>180</sup> The program called for a budget of almost \$8 billion, with seventy percent going to law enforcement and thirty percent going to prevention, education, and treatment.<sup>181</sup> The budget drew great criticism. Researchers balked when Bush proposed only \$500 million to be spent on research; some thought that not enough information about addiction was available to create an effective program, while others claimed that the future of drug treatment was actually in the discovery of new drugs.<sup>182</sup> President Bush’s program was relentlessly criticized for the absence of a focus on treatment. Even Congress felt the plan was too light in treatment, funding so it added \$1.1 billion to the original \$925 million set aside for treatment.<sup>183</sup> Lack of treatment facilities presented another problem. Public facilities were overflowing, and individuals wishing to enter treatment programs had to be placed on long waitlists.<sup>184</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>175</sup> *Id.*

<sup>176</sup> Wink, *supra* note 151, at 215.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Dan Check, The Successes and Failures of George Bush’s War on Drugs, <http://www.drugsense.org/tfy/bushwar.htm> (last visited June 22, 2010).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

The Bush administration proposed targeting the demand for drugs by arresting users instead of investing in prevention or attacking supply channels.<sup>185</sup> The plan was to be implemented not by federal forces, but through state law enforcement, with penalties in the form of reduced funding for States that failed to comply.<sup>186</sup> Drug arrests increased by almost sixty-nine percent, from 56,013 in 1985 to 94,490 in 1989, resulting in a skyrocketing prison population.<sup>187</sup> This prison overcrowding meant that prison sentences had to be reduced. With reduced prison sentences, offenders often chose to serve their prison terms instead of going into treatment, which could take longer.<sup>188</sup>

The biggest success of the Bush Administration was the twenty-two percent decline in cocaine usage.<sup>189</sup> However, it is unclear whether the government was entirely responsible for this decline; it is also a possibility that the middle class began voluntarily backing away from cocaine after learning of its effects.<sup>190</sup> In contrast to the overall decline in cocaine use, cocaine use among the poor soared to levels higher than before the war on drugs was declared, and the crime rate increased as well.<sup>191</sup> In general, President George H. W. Bush continued former President Reagan's crusade against drugs, primarily focusing on law enforcement efforts. However, at the end of President Bush's term, America saw little if any progress in the War on Drugs.

#### F. Clinton Contended for Increased Treatment in Drug Policy

Throughout his presidential campaign, President Bill Clinton criticized former President George H. W. Bush's performance in regard to the drug war, stating:

Bush confuses being tough with being smart, especially on drugs. You can't get serious about crime without getting serious about drugs. Bush thinks locking up addicts instead of treating them before they commit crimes—or failing to treat them once they're in prison, which is basically the case now—is clever politics. That may be, but it

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<sup>185</sup> Check, *supra* note 180.

<sup>186</sup> In November of 1990, Congress passed a bill encouraging states to suspend driver's licenses and revoke government permits and benefits of drug crime convicts; if the states did not enact the legislation, the federal government would significantly reduce the federal funding for highways. Under the plan, states were slated to receive only \$200 million from the federal government to pay for the extra expense of implementing the federal program. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Check, *supra* note 180.

<sup>191</sup> *Id.*

certainly isn't sound policy, and the consequences of his cravenness could ruin us.<sup>192</sup>

President Clinton also called for drug policy reform that favored treatment over enforcement. He asserted:

Without it, the criminals will revert when they're released, and the problem will just get worse. Emphasizing treatment may not satisfy people fed up with being preyed upon, but a President should speak straight even if what he advocates isn't popular. If he sticks to his guns, the results will prove the wisdom of his policy.<sup>193</sup>

Despite his campaign promises to be tough on crime by being tough on drugs, one of President Clinton's first acts was to reduce by eighty-three percent the staff in the Office of National Drug Control and Policy.<sup>194</sup> Additionally, President Clinton failed to appoint a new ONDCP Director until April of 1993, when he finally chose Lee Brown.<sup>195</sup> However, Brown had to compete with the new outspoken Surgeon General, Joycelyn Elders.<sup>196</sup> Shortly after President Clinton appointed her, Surgeon General Elders suggested the legalization of certain drugs.<sup>197</sup> President Clinton responded swiftly and unambiguously reaffirmed his position opposing legalization by stating that "[b]asically, it's not going to happen," and by outright refusing to "even study the issue."<sup>198</sup> In 1994, President Clinton removed Elders from office because of her unorthodox views and comments regarding sexual education.<sup>199</sup> Just one year later, Brown resigned his position when Congress decided to cut staffing at the ONDCP by twenty percent.<sup>200</sup>

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<sup>192</sup> Michael Kramer, *Clinton's Drug Policy Is a Bust*, TIME, Dec. 20, 1993, at 33, available at <http://www.time.com/time/magazine/article/0,9171,979873-1,00.html>.

<sup>193</sup> *Id.* Even though President Clinton vowed to make treatment, not law enforcement, the center of his drug policy, by the end of his administration virtually nothing had changed, at least in regard to funding. Of the \$17.9 billion expended on drug related efforts in 1999, only \$5.5 billion was spent on prevention and treatment efforts, while \$12.4 billion was spent on law enforcement, interdiction, and efforts to reduce sources of drug supply. Margarita Mercado Echegaray, *Drug Prohibition In America: Federal Drug Policy and Its Consequences*, 75 REV. JUR. U.P.R. 1215, 1243 (2006). See also Press Release, Office of the Vice President, Vice President Gore Unveils 1999 National Drug Control Strategy (Feb. 8, 1999), available at <http://www.hhs.gov/news/press/1999pres/19990208.html>. Similarly, for the year 2000 President Clinton requested \$5.6 billion for treatment and prevention programs and \$12.1 billion for law enforcement and interdiction efforts. Echegaray, 75 REV. JUR. U.P.R. at 1243.

<sup>194</sup> DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 282 (Oxford University Press 1999).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Kramer, *supra* note 192.

<sup>198</sup> Stephen Labaton, *Surgeon General Suggests Study of Legalizing Drugs*, N.Y. TIMES, Dec. 8, 1993, at A23, available at <http://www.nytimes.com/1993/12/08/us/surgeon-general-suggests-study-of-legalizing-drugs.html?pagewanted=1>.

<sup>199</sup> MUSTO, *supra* note 194, at 283.

<sup>200</sup> *Id.*

Little did President Clinton realize that he would soon encounter a problem very similar to the cocaine issues that had plagued former President Reagan—although this time, the problem was marijuana. Beginning in 1992, and throughout President Clinton's first term in office, the use of marijuana among teenagers was on the rise.<sup>201</sup> In 1996, an election year, President Clinton renewed his attack on drugs and appointed Barry McCaffrey as director of the ONDCP.<sup>202</sup>

Late in 1996, California passed Proposition 215, also known as the Compassionate Use Act of 1996, which “decriminalized the possession of small amounts of marijuana for patients suffering from serious, debilitating diseases.”<sup>203</sup> The statute provided that “no physician in [California] shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.”<sup>204</sup> While physicians were now free to discuss the use of marijuana for medicinal purposes, they still could not prescribe the drug. Patients instead were required to grow it themselves or buy it from other sources. In direct response to Proposition 215, the Clinton Administration declared that the California proposition and the medical marijuana acts passed in other states would not impact enforcement of federal drug laws.<sup>205</sup> The administration's response faced heavy backlash from advocates of medical marijuana use, and several members of the medical field.<sup>206</sup> These critics claimed that the response was simply an effort to assure the public that the

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According to the Monitoring the Future survey, the percentage of twelfth-graders who said they had used the drug at least once during the last 30 days rose from 11.9 percent in 1992 to 21.2 percent in 1995; the percentage of eighth[-]graders increased from 3.7 percent to 9.1 percent over the same period.

*Id.*

<sup>202</sup> *Id.*

<sup>203</sup> J. Wells Dixon, Conant v. McCaffrey: *Physicians, Marijuana, And The First Amendment*, 70 U. COLO. L. REV. 975, 978 (1999).

<sup>204</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (West 1999).

<sup>205</sup> President Clinton, through drug czar Barry McCaffrey, the Department of Justice, the Department of Health and Human Services, and the Drug Enforcement Administration, warned physicians that they would be prosecuted for recommending marijuana to their patients, and warned patients they would be prosecuted for using the drug. See Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164–66 (Feb. 11, 1997).

<sup>206</sup> Several groups began challenging the federal government's marijuana policy. See, e.g., Conant v. McCaffrey, 172 F.R.D. 681, 698 (N.D. Cal. 1997) (granting a preliminary injunction against the federal government, prohibiting the prosecution or sanctioning of physicians who recommended the medical use of marijuana, but recognizing that “[i]f [the] physicians' conduct, which could include speech, [rose] to the level of aiding and abetting or conspiracy in violation of valid federal [drug laws], such conduct [would be] punishable under federal law”).



Clinton Administration was not easy on drugs.<sup>207</sup> Overall, under the Clinton administration, the War on Drugs set new records in regard to money spent, number of arrests and incarcerations, and length of prison terms.<sup>208</sup>

#### G. Bush Battled Demand for Drugs

President George W. Bush, elected in November of 2000, made the most aggressive statements regarding the war on drugs since the Reagan administration when he asserted that “[d]rug abuse threatens everything, everything that is best about our country . . . . It breaks the bond between parent and child. It turns productive citizens into addicts. It transforms schools into places of violence and chaos. It makes playgrounds into crime scenes. It supports gangs at home.”<sup>209</sup> He claimed that “[o]ver time, drugs rob men, women and children of their dignity and of their character,” he and declared that “[i]llegal drugs are the enemies of ambition and hope and when we fight against drugs we fight for the souls of our fellow Americans.”<sup>210</sup>

After several months of searching for an appropriate drug czar, President Bush finally appointed John Walters in May 2001.<sup>211</sup> In his nomination speech, President Bush affirmed their shared anti-drug stance, and expressly disagreed with those who favored legalization. Bush stated that “the only humane and compassionate response to drug use is a moral refusal to accept it.”<sup>212</sup> He then went on to say that the administration would continue efforts to eradicate the drug supply, but revealed his plan to focus instead on the demand side of the drug problem.<sup>213</sup>

The 2002, 2005, and 2006 National Drug Strategies of the Bush administration reiterated the belief that the fight against drug use must continue.<sup>214</sup> While former President Clinton had created a complex and comprehensive National Drug Control

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<sup>207</sup> *Id.*

<sup>208</sup> Dixon, *supra* note 203, at 999.

<sup>209</sup> *Bush: War On Drugs Aids War On Terror*, CBS News, Dec. 14, 2001, <http://www.cbsnews.com/stories/2001/12/14/politics/main321433.shtml>.

<sup>210</sup> *Id.*

<sup>211</sup> Remarks Announcing the Nomination of John P. Walters To Be Director of the Office of National Drug Control Policy, 1 PUB. PAPERS 506 (May 10, 2001), *available at* <http://www.presidency.ucsb.edu/ws/?pid=45600>.

<sup>212</sup> *Id.* at 507.

<sup>213</sup> *Id.* at 507–08.

<sup>214</sup> OFFICE OF NATIONAL DRUG CONTROL POLICY NATIONAL DRUG CONTROL STRATEGY, UPDATE 4 (2005), *available at* <http://studentoffortune.com/question/103663/sociology/158745-RelativeResourceManager2.pdf> [hereinafter 2005 NDCS UPDATE] (updating drug control strategies and progress from 2001 through 2005 while projecting those for 2006).

Strategy,<sup>215</sup> President Bush's strategies had just two sets of articulated goals: two-year goals and five-year goals. The two-year goals called for a ten percent decrease in illicit drug use by eighth-, tenth-, and twelfth-graders, and a ten percent decrease in illicit drug use by individuals over the age of majority.<sup>216</sup> The five-year goals called for a twenty-five percent decrease in current illicit drug use by eighth-, tenth-, and twelfth-graders, and a twenty-five percent decrease in illicit drug use by individuals over the age of majority.<sup>217</sup>

Additionally, the 2002, 2005, and 2006 Drug Strategies also attempted to balance the attack on the supply of drugs with the attack on the demand for drugs. The focus of the Drug Strategies was to "denormalize drug use by creating a climate of public intolerance toward the drug-using behavior that all too often leads to addiction."<sup>218</sup> The Drug Strategies set forth three national priorities: (1) Stopping Use Before It Starts: Education and Community Action,<sup>219</sup> (2) Healing America's Drug Users: Getting Treatment Resources Where They Are Needed,<sup>220</sup> and (3) Disrupting the Market: Attacking the Economic Basis of the Drug Trade.<sup>221</sup> While President Bush proclaimed to balance prevention, treatment, and supply strategies, his drug budget told a different story.

At first glance, a comparison of the 2001 Drug Control Budget with subsequent Drug Control Budgets shows a reduction in drug control spending. However, this was just an illusion created by restructuring the budget through, among other things, exclusion of drug-related spending by the federal judiciary, the Federal Bureau of Prisons, and other Justice Department agencies in the prosecution and incarceration of drug

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<sup>215</sup> See *supra* Part II.F.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 34.

<sup>219</sup> Prevention efforts included "school- and community- based programs, student drug testing programs, and public service advertisements." *Id.* at 15.

<sup>220</sup> The expansion of treatment resources was a priority in both the 2005 and 2006 National Drug Strategies. These efforts included

drug courts, where the power of the criminal justice system is combined with the skillful healing of treatment providers in service of the drug dependent individual, . . . hospital emergency rooms, where doctors are now screening individuals for evidence of drug dependence and referring them to treatment as needed, . . . nonprofit organizations that serve the needs of formerly addicted prisoners reentering society.

*Id.* The treatment priority focused on "[e]mpowering individuals by allowing them to choose among various drug-treatment programs." *Id.* at 25–28.

<sup>221</sup> The National Drug Control Strategies also sought to disrupt the market for illegal drugs by "inflict[ing] on [the drug] business what every legal business fears—escalating costs, diminishing profits, and unreliable suppliers." *Id.* at 39.

offenders.<sup>222</sup> Because much of the drug law enforcement resources were wiped from the Drug Control Budget, it is difficult to estimate how much the war on drugs actually cost, but the 2004 and 2005 Drug Control Budgets did show that increased resources were allocated to enforcement and interdiction.<sup>223</sup> Thus, while billions of dollars were spent on drug use prevention and reduction, most of the drug control budget was still allocated to law enforcement efforts.

In 2002, Asa Hutchinson, then the head of the DEA, stated that the DEA would “continue to aggressively identify and build cases against drug-trafficking organizations contributing to global terrorism” and “[i]n doing so, [would] limit the ability of drug traffickers to use their destructive goods as a commodity to fund malicious assaults on humanity and the rule of law.”<sup>224</sup> Furthermore, the Bush administration continued the assault on medical marijuana and ultimately shut down thirty to forty dispensaries.<sup>225</sup> These efforts by the Bush administration were bolstered in 2005 by the Supreme Court’s decision in *Gonzales v. Raich*.<sup>226</sup> In *Raich*, the Court held that, under the commerce power, Congress could forbid the use of marijuana even in states where it was approved for medical purposes.<sup>227</sup> Overall, while President Bush’s strategies called for an increased focus on prevention and treatment, the actions of his administration tended to show that the focus remained squarely on law enforcement.

#### H. Obama Opts for Change in Drug Policy

As a presidential candidate, Barack Obama declared the war on drugs to be “an utter failure.”<sup>228</sup> However, despite President

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<sup>222</sup> See OFFICE OF NATIONAL DRUG CONTROL POLICY NATIONAL DRUG CONTROL STRATEGY: FY 2003 BUDGET SUMMARY, available at <http://www.whitehousedrugpolicy.gov/publications/pdf/budget2002.pdf> (last visited June 21, 2010).

<sup>223</sup> For example, the total budget for 2004 was \$11.8 billion, of which \$3.4 billion was allocated to the Department of Health and Human Services and \$594.4 million to the Department of Education. Meanwhile, for that same year, nearly \$7.4 billion was expended on law enforcement, criminal justice, interdiction, and drug eradication through departments and agencies such as the Department of Defense, Department of Homeland Security, and the Office of National Drug Control Policy. See 2005 NDCCS UPDATE, *supra* note 214, at 61.

<sup>224</sup> James Bovard, The Bush Administration’s “Drugs = Terrorism” Fraud (Apr. 2002), <http://www.fff.org/comment/com0204f.asp>.

<sup>225</sup> Alex Johnson, *DEA to End Medical Marijuana Raids*, MSNBC, Feb. 27, 2009, <http://www.msnbc.msn.com/id/29433708/>.

<sup>226</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>227</sup> *Id.* at 2.

<sup>228</sup> Obama’s Drug Czar Calls for End to ‘War on Drugs,’ <http://www.veteranstoday.com/2009/05/15/obama-s-drug-czar-calls-for-end-to-war-on-drugs/> (last visited May 15, 2010).

Obama's campaign promises to stop federal drug raids of medical marijuana facilities, in early February 2009, the DEA, headed by Bush appointee Michele Leonhart, raided four medical marijuana facilities in California.<sup>229</sup> This prompted President Obama to take action in implementing his plan to flip drug policy on its head. Around the same time, the U.S. Senate confirmed Eric Holder as Attorney General.<sup>230</sup> Then, in May 2009, the U.S. Senate confirmed Gil Kerlikowske as the head of the Office of National Drug Control Policy.<sup>231</sup>

In March 2009, Attorney General Holder stated that the Department of Justice would not prosecute marijuana dispensaries that operated legally under state law, thus supporting the Obama administration's somewhat hands-off approach to such institutions.<sup>232</sup> The priority of the Obama administration was to go after drug offenders that were violating both federal and state law.<sup>233</sup> In May 2009, Director Kerlikowske called for an end to the "war on drugs."<sup>234</sup> Criticizing the phrase, he stated that "[r]egardless of how you try to explain to people it's a 'war on drugs' or a 'war on a product,' people see a war as a war on them;" he also asserted that "[w]e're not at war with people in this country."<sup>235</sup> After the Obama administration was vocal in its position, the raids ceased for a while. Then, without regard to the administration's position, raids resumed in August 2009 when several clubs in Venice and Los Angeles were

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<sup>229</sup> Stephen Dinan & Ben Conery, *Bush Holdovers at DEA Continue Pot Raids: Obama Vowed to End Policy*, WASH. TIMES, Feb. 5, 2009, at A1, available at <http://www.washingtontimes.com/news/2009/feb/05/dea-led-by-bush-continues-pot-raids/>.

<sup>230</sup> Neil A. Lewis, *Senate Votes 75-21 to Confirm Holder as Attorney General*, N.Y. TIMES, Feb. 2, 2009, available at <http://www.nytimes.com/2009/02/03/us/politics/03holder.html>.

<sup>231</sup> United States Senate—Committee on the Judiciary, Director of National Drug Control Policy—R. Gil Kerlikowske, <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/DirectorNDCP-Kerlikowske.cfm> (last visited June 21, 2010). When Vice President Biden announced Gil Kerlikowske's nomination, he simultaneously formally downgraded the position to non-Cabinet level, a move which Vice President Biden had heavily criticized when made by President George H. W. Bush in 1989. Vice President Biden's own wealth of knowledge regarding drug policy may be the reason for this move. See President to Downgrade Drug Czar Position from Cabinet Rank—A Move Biden Criticized in 1989, <http://blogs.abcnnews.com/politicalpunch/2009/03/president-to-do.html> (Mar. 11, 2009, 10:21 PST).

<sup>232</sup> Josh Meyer & Scott Glover, *U.S. Won't Prosecute Medical Pot Sales*, L.A. TIMES, Mar. 19, 2009, at A8, available at <http://articles.latimes.com/2009/mar/19/local/me-medpot19>.

<sup>233</sup> *Id.*

<sup>234</sup> Gary Fields, *White House Czar Calls for End to 'War on Drugs,'* WALL ST. J., May 14, 2009, at A3, available at <http://online.wsj.com/article/SB124225891527617397.html>.

<sup>235</sup> *Id.*

attacked and agents raided a shop in Upper Lake, California.<sup>236</sup> On September 9, 2009, the DEA, still headed by Michele Leonhart, infiltrated at least twenty clubs in San Diego.<sup>237</sup>

In October 2009, Attorney General Holder clarified the Obama administration's stance on medical marijuana by ordering federal prosecutors to back down from pursuing cases involving medical marijuana patients. He stated, "it will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana."<sup>238</sup> Rather, in fourteen states that allow marijuana for medical purposes, President Obama indicated that prosecutors needed to focus their efforts on high level drug traffickers, money launderers, and people using the medical marijuana laws as a cover.<sup>239</sup> Then, over a year after his inauguration, President Obama shockingly nominated Michele Leonhart to be the head of the DEA.<sup>240</sup> After her nomination, the DEA raids resumed. In February 2010, DEA agents raided a medical marijuana operation under the control of Chris Bartkowicz after he granted an interview to a local Colorado television station.<sup>241</sup> The DEA also hit two medical marijuana labs that were testing the drug for contaminants.<sup>242</sup> At present, there is concern that by keeping Michele Leonhart as the head of the DEA, President Obama may be undermining, or possibly worse, backtracking on his drug war promises.<sup>243</sup>

On February 1, 2010, the Obama administration released the 2011 National Drug Control Budget.<sup>244</sup> It includes a 13.4 percent increase in spending on prevention programs and a 3.7 percent increase in treatment funding and it also demands an

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<sup>236</sup> Ryan Grim, *DEA Raid Has Pot Clubs Worried*, HUFFINGTON POST, Feb. 16, 2010, [http://www.huffingtonpost.com/2010/02/16/dea-raid-has-pot-clubs-wo\\_n\\_464598.html](http://www.huffingtonpost.com/2010/02/16/dea-raid-has-pot-clubs-wo_n_464598.html).

<sup>237</sup> *Id.*

<sup>238</sup> Carrie Johnson, *U.S. Eases Stance on Medical Marijuana*, WASH. POST, Oct. 20, 2009, at 1A, 6A, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/19/AR2009101903638.html>.

<sup>239</sup> *Id.*

<sup>240</sup> Press Release, The White House, Office of the Press Secretary, President Obama Announces More Key Administration Posts (Jan. 25, 2010), *available at* <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts>. Michele Leonhart is known as a drug warrior; she has a strong distaste for marijuana that extends beyond prosecuting medical marijuana patients. Phillip S. Smith, *Obama Nominates Drug Warrior Michele Leonhart to Head DEA—Reformers Gird for Battle*, Jan. 29, 2010, [http://stopthedrugwar.org/chronicle/618/obama-nominates\\_michele\\_leonhart\\_dea\\_administrator](http://stopthedrugwar.org/chronicle/618/obama-nominates_michele_leonhart_dea_administrator).

<sup>241</sup> Grim, *supra* note 236.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL BUDGET: FY 2011 FUNDING HIGHLIGHTS 3–13 (2010), *available at* <http://www.whitehousedrugpolicy.gov/publications/policy/11budget/fy11highlight.pdf>.

increase in funding for domestic law enforcement, interdiction, and international programs.<sup>245</sup> Thus, sixty-four percent of the drug control budget would remain in supply reduction efforts while thirty-six percent of the budget would be allocated to demand reduction efforts.<sup>246</sup> These numbers show virtually no change from the budgets produced by the Bush administration, despite President Obama's promise of change.<sup>247</sup> The Obama Administration certainly has plenty of time to follow through on campaign promises, with two years until the next election year. However, as of now, despite the administration's promises to change drug policy, America remains in virtually the same position it was in during the years of George W. Bush's presidency.

### III. COMPLICATIONS WITH CONSISTENCY AND COMMITMENT

Since President Richard Nixon declared the War on Drugs in 1971, each administration has taken a different approach to combating drug addiction and implementing and enforcing drug policy. The varying and often contradictory approaches have led to confusion, and ultimately have contributed to what many individuals and experts deem a failure of the War on Drugs.

President Nixon started the War on Drugs by placing anti-drug policies in the spotlight, creating the Drug Enforcement Agency and making known his views opposing legalization. Unfortunately, when Nixon left office his dedication to fighting drug use in America departed with him.<sup>248</sup> President Ford's actions in regard to the drug war were either indifferent or confused. He commanded a review of drug policy and called for funding to be cut for the Office of Drug Abuse Policy, but then he created two drug-related Cabinet Positions.<sup>249</sup> President Ford's less than impactful drug policy was all but forgotten when President Carter ran for and won the Presidency based on a platform committed to decriminalizing drugs. However, President Carter faced a few setbacks and thus, although his viewpoints were completely opposed by his successor, President Reagan, the change in administration was not quite as drastic as it could have been.<sup>250</sup>

President Reagan's administration resumed President Nixon's crusade against drug use. He had a zero tolerance policy

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<sup>245</sup> *Id.* at 3–13.

<sup>246</sup> *Id.* at 13.

<sup>247</sup> *See supra* part II.G.

<sup>248</sup> *See supra* Part II.A.

<sup>249</sup> *See supra* Part II.B.

<sup>250</sup> *See supra* Part II.C.

that even then First Lady Nancy Reagan promoted with her ever-popular “Just Say No” campaign.<sup>251</sup> President George H. W. Bush followed in President Reagan’s footsteps by continuing the focus on enforcement and by establishing the position of drug czar to oversee all drug agencies.<sup>252</sup> When President Clinton took office, he sought to transition the drug policy focus from enforcement to treatment, but, with the rise of the medical marijuana issues, enforcement remained in the forefront of drug policy.<sup>253</sup> President George W. Bush brought back the aggression of the Reagan administration, with the slightly different goal of targeting demand as well as supply through promotion of prevention and the continuance of interdiction.<sup>254</sup> President Obama has claimed to be taking a different approach, eradicating the use of the phrase the “war on drugs” and deferring to the states when it comes to medical marijuana laws.<sup>255</sup> However, over one year into the Obama administration, it still remains unclear whether or not his call for change will actually materialize.

Clearly, there are differences among all of these administrations, but even more concerning than such inconsistencies between administrations are the inconsistencies within some administrations. These discrepancies started with the Ford administration when Congress established the Office of Drug Abuse Policy and President Ford promptly asked for its funding to be revoked and instead created two Cabinet positions in place of the agency.<sup>256</sup> Next, the Carter administration faced even more internal contradictions than the Ford administration. President Carter started out with a drug policy dedicated to decriminalization, but backed off his efforts of reform as a result of a scandal regarding the person he had appointed to deal with drug policy.<sup>257</sup> President Carter appointed a replacement with diametrically different views about decriminalization and ultimately supported the DEA in its creation of anti-drug model laws.<sup>258</sup>

President Clinton wanted to see major reforms in drug policy, yet, at the same time, he wanted to cut the staff of the Office of National Drug Control Policy by eighty-three percent. While President Clinton wanted to shift the focus from law

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<sup>251</sup> See *supra* Part II.D.

<sup>252</sup> See *supra* Part II.E.

<sup>253</sup> See *supra* Part II.F.

<sup>254</sup> See *supra* Part II.G.

<sup>255</sup> See *supra* Part II.H.

<sup>256</sup> See *supra* Part II.B.

<sup>257</sup> See *supra* Part II.C.

<sup>258</sup> See *id.*

enforcement to treatment, the War on Drugs during his administration saw the record levels of arrests, incarcerations, and prison terms, and the Clinton administration spent more money on the drug war than any previous administration.<sup>259</sup> The second President Bush's inconsistencies came in the form of budgeting. While President George W. Bush supported a drug policy that attacked demand for drugs more heavily than the drug supply, his budget did not reflect his mission.<sup>260</sup> However, just over one year into its term, the Obama administration has some of the most obvious inconsistencies. While President Obama touts an administration committed to changing drug policy through targeting top level drug offenders and letting states deal with minor offenders, the actions of his administrative agencies do not follow such aspirations, as is evidenced by the DEA's continuing medical marijuana raids. Additionally, President Obama has nominated Michele Leonhart to continue leading the DEA.<sup>261</sup> Not only is Michele Leonhart a holdover from the Bush administration that President Obama heavily criticized, but also her drug warrior reputation and anti-drug stance conflicts greatly with President Obama and his appointments for Attorney General and drug czar.<sup>262</sup> As an unfortunate result, the Obama administration has said one thing while doing another. Luckily for President Obama—and the American public—he still has a few more years in office to rectify these inconsistencies.

The myriad of different, often contradictory, viewpoints is not limited to those in charge of drug policy, but also extends to people trying to reform it.

#### IV. CHAMPIONING FOR CHANGE

There has been much criticism of the War on Drugs, and many solutions have been suggested. There are few—if any—who believe that the current drug policies are working perfectly, and so the debate is not whether to reform, but rather how and to what degree. Some think current drug policies are a good start, but they also think that these policies need tweaking and continual maintenance. Others argue that there needs to be an intense evaluation and a major overhaul. Still others demand a diametric shift in position, at least in regard to certain drugs. At the 2010 *Chapman Law Review* Symposium, “Drug War Madness: Policies, Borders & Corruption,” the first panel,

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<sup>259</sup> See *supra* Part II.F.

<sup>260</sup> See *supra* Part II.G.

<sup>261</sup> See *supra* Part II.H.

<sup>262</sup> See *id.*



entitled *Current U.S. Drug Policies & Alternative Paradigms*, addressed the reform issue. Panelists, including former head of the DEA Asa Hutchinson, Thomas Jefferson School of Law Professor Alex Kreit, and retired Orange County Superior Court Judge Jim Gray, discussed their varying views on drug reform.

Asa Hutchinson favored broad reform that built upon current drug policies.<sup>263</sup> He stressed that it was a common misconception that America was not making sufficient progress in the drug war because such a view was simply not supported by the statistics.<sup>264</sup> Mr. Hutchinson went on to describe how between 1979 and 2007 there was a fifty percent reduction of illegal drug use, with a seventy-five percent reduction in cocaine use, and between 2003 and 2007 marijuana use decreased each year.<sup>265</sup> Mr. Hutchinson advocated for drug treatment courts, just as he did when he was head of the DEA, stating that drug treatment courts allow addicts to have a chance for “treatment with accountability.”<sup>266</sup> However, Mr. Hutchinson further contended that treatment courts do not work without an enforcer, and he stated that from his own personal experience, drug offenders who enter and complete rehabilitation programs often thank their arresting officers first.<sup>267</sup> Mr. Hutchinson specifically criticized the idea of decriminalizing and/or legalizing drugs.<sup>268</sup> He cited the decriminalization experiment in Alaska, where the state decriminalized marijuana, resulting in exponential increase in use and a dissatisfied public; ultimately Alaska recriminalized marijuana.<sup>269</sup> Mr. Hutchinson stated two other reasons for not decriminalizing drugs: first, America would have to legalize all drugs in order to impact drug cartels, and even then cartels would still exist, and second, the possibility or even probability of earning revenue should not be a factor in deciding whether to decriminalize drugs because policy should focus on “think[ing] about the next generation, and not just in terms of money.”<sup>270</sup>

Alex Kreit took a different stance, calling for a major transformation in drug policy.<sup>271</sup> Professor Kreit stated that the

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<sup>263</sup> Asa Hutchinson, Former Dir. of the U.S. Drug Enforcement Admin., Address at the Chapman Law Review Annual Symposium (Jan. 29, 2010).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Alex Kreit, Assistant Professor of Law and Dir. of the Ctr. for Law and Social Justice, Thomas Jefferson School of Law, Address at the Chapman Law Review Annual Symposium (Jan. 29, 2010).

drug policy was failing because America was incarcerating more drug offenders than any other country and the American public was still using drugs at a higher rate than other countries.<sup>272</sup> He stated that the answer was not in federal decriminalization or legalization, since the federal government could not accomplish this by simply removing all regulation.<sup>273</sup> Professor Kreit acknowledged the need for spending reform and federal sentencing reform, but primarily advocated for structural reform.<sup>274</sup> He argued that the federal government needed to allow states and localities to innovate in regard to drug policy, but that they also needed to regulate such innovation.<sup>275</sup> Overall, Professor Kreit called for a reform in the interactions between the states and the federal government in regard to drug policy.

Judge Jim Gray took the most aggressive stance on reforming drug policy by calling for legalization—at least for marijuana.<sup>276</sup> Judge Gray asserted that “drugs are here to stay,” and claimed that every civilization in history had some sort of mind altering drugs.<sup>277</sup> He argued that we need to realize drugs are a permanent fixture in American culture and we need to work on reducing use instead of prohibiting it.<sup>278</sup> Judge Gray cited to the fact that that while six groups of people—drug lords, juvenile gangs, government officials fighting drug lords and juvenile gangs, politicians, private sector security providers, and terrorist groups—are winning in the war on drugs, everyone else, especially the children, are losing.<sup>279</sup> Judge Gray specifically asserted that drugs needed to be scheduled by physicians and the Surgeon General, rather than by law enforcement officers and the head of the DEA.<sup>280</sup> Ultimately, Judge Gray argued some drugs needed to be rescheduled, legalized, regulated, taxed, and controlled, as opposed to just prohibited.

With all of the inconsistencies among administrations, inconsistencies within administrations, and varying methods and degrees of suggested reform, it is amazing that American drug policy is not far less effective or even more confused. What America needs most in regard to drug policy is consistency with no more dynamic changes between administrations, and

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Hon. Jim Gray, Judge, Orange County Superior Court, Address at the Chapman Law Review Annual Symposium (Jan. 29, 2010).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

certainly no more dramatic policy differences within administrations.

#### V. A CALL FOR CONSISTENCY

Despite the best of intentions and great efforts, the Office of National Drug Control Policy is simply not what America needs to create and maintain drug policy. Instead, the United States should establish a Drug Policy Board that is solely responsible for U.S. drug policy. This Drug Policy Board should not be restricted by the limitations currently placed on the Office of National Drug Control Policy, whose Director, by law,<sup>281</sup> must oppose any attempts at drug legalization. Such limitations are just too restrictive to the development of drug policy.<sup>282</sup> The Drug Policy Board should not be given an agenda, but rather the Board itself should develop an agenda that best serves the American public.

The Drug Policy Board should have at least some sort of political independence, and would be best modeled after the Federal Reserve Board of Governors.<sup>283</sup> The Drug Policy Board

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<sup>281</sup> Title VII—Office of National Drug Control Policy Reauthorization Act of 1998, Pub. L. No. 105-277, 21 Stat. 1701 (1998) provides:

The Director . . . shall ensure that no Federal funds appropriated to the Office of National Drug Control Policy shall be expended for any study or contract relating to the legalization (for a medical use or any other use) of a substance listed in schedule I of section 202 of the Controlled Substances Act (21 U.S.C. 812) and take such actions as necessary to oppose any attempt to legalize the use of a substance (in any form) that . . . is listed in schedule I of section 202 of the Controlled Substances Act (21 U.S.C. 812); and . . . has not been approved for use for medical purposes by the Food and Drug Administration.

<sup>282</sup> For example, if the government finds that marijuana has a “currently accepted medical use in treatment in the United States” or “accepted safety for use of the drug under medical supervision,” then the drug must be removed from its Schedule I classification and it would be legalized for medical use. However, as established by law, the drug czar must oppose legalization, and may in fact be required to downplay or even conceal any studies regarding to medical uses of marijuana or other Schedule I drugs. This leads to a drug policy that will always be rooted in prohibition without any consideration for changing circumstances. See Peter Guither, *The Drug Czar Is Required By Law To Lie*, <http://www.drugwarrant.com/articles/drug-czar-required/>.

<sup>283</sup> The Federal Reserve Board of Governors is comprised of seven members who are appointed by the President of the United States to fourteen-year staggered terms such that one term expires on January 31 of every even numbered year; thus, if all governors serve their full fourteen-year terms, each President will only have the opportunity to appoint two governors during his four-year term, or four governors during his eight-year term. Once appointed, the governors may not be removed for their policy views. The lengthy, staggered terms and the practically irrevocable appointments are intended to insulate the Board of Governors from political pressures. Additionally, the President is to choose both a Chairman and a Vice Chair from the sitting governors; these individuals will serve a four-year term that is renewable until their terms as governors (fourteen years) expire. The Chairman fills the role of both spokesperson for and representative of the Board of Governors; the Chairman also manages the staff and presides over Board

should have nine voting members and three non-voting members. Each of the voting members shall be appointed by the President, confirmed by the Senate, and serve fourteen-year terms with no two voting members being from the same state. The three non-voting members should consist of the Attorney General, the Surgeon General, and the Secretary of Education; and each of these members will remain on the Drug Policy Board during their appointment to their respective positions. The President will appoint the Chairman and Vice Chairman of the Drug Policy Board from the currently seated voting members. The Chairman and the Vice Chairman shall serve four-year terms renewable until their terms as board members (fourteen years) expire, or until they resign the position.

The Drug Policy Board will have three distinct divisions: (1) education, (2) treatment, and (3) enforcement. The education division of the board will focus on drug use prevention in the form of education in schools and communities; this division will always include the Secretary of Education. The education division will devise after school and community programs as well as advertising campaigns to educate the public about drugs and drug use. The treatment division will focus on the classification of drugs within the current schedule as well as how best to treat addicts, whether or not they have been convicted of a drug offense; this division will always include the Surgeon General. The treatment division will research possible medical benefits of currently scheduled drugs as well as new drugs. The enforcement division will work on strategies to attack both drug demand and drug supply; this division will always include the Attorney General. The enforcement division will oversee the Drug Enforcement Agency. The remaining nine voting members will be divided into the divisions based on their individual backgrounds; when the President appoints new members to the board, he or she should consider what division void needs to be filled in making the appointment. Additionally, once a member is appointed, just like governors of the Federal Reserve Board, that member may not be removed for policy views.

While the staggered and lengthy terms and irrevocable appointments will help to insulate the Drug Policy Board, the board cannot be as independent as the Federal Reserve Board. Instead, the Drug Policy Board must function as part of the government as a whole, under the watchful eyes of Congress.

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meetings. See The Federal Reserve Frequently Asked Questions the Board of Governors, <http://www.federalreserve.gov/generalinfo/faq/faqbog.htm> (last visited Mar. 13, 2010).

However, all drug policy must be initiated by the Drug Policy Board.<sup>284</sup>

The Drug Policy Board is designed to withstand presidential changes and public preference transformations. The Board will incorporate all of the ideas that have been tossed around by past administrations as well as those demanding reform. Overall, by establishing a Drug Policy Board as set forth above, the government will introduce an element of consistency in drug policy that has been lacking since the War on Drugs was declared in 1971.

#### CONCLUSION

Conflicting views on how to deal with drug abuse in the United States have left the war on drugs without any fight, and demands for reform are as divergent as past presidential policies. Thus, among the continuously changing leadership of the United States, there must be some consistency infused in drug policy. The establishment of a Drug Policy Board modeled after the Federal Reserve Board of Directors will bring the consistency in drug policy that the United States needs, and frankly cannot progress without.

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<sup>284</sup> Under this proposal, members of Congress, the President, State Officials, Lobbyists, and even individuals may submit proposals to the Drug Policy Board, but any legislation related to drug policy should be initially reviewed by the Drug Policy Board before it is submitted to Congress.